

In the Matter of )  
 )  
Paging Network, Inc. )  
 )  
Request for Waiver of Section 90.665 of the )  
Commission's Rules Relating to the )  
Construction of 900 MHz SMR MTA )  
Facilities )

<sup>3</sup> *Id.* § 90.665(c). At the three-year construction benchmark, a licensee must notify the Commission either that it has met the one-third-population coverage requirement or that it intends to submit a showing of substantial service

3. PageNet was the second largest bidder in the 900 MHz SMR auction and was granted 126 licenses in this spectrum band on August 12, 1996.<sup>4</sup> Thus, PageNet's three-year construction deadline for these licenses was August 12, 1999 and its five-year construction deadline is August 12, 2001. Given the results of the auction and successful negotiations to acquire additional 900 MHz licenses from incumbent providers in several markets, PageNet's licenses give it a nationwide footprint for 900 MHz SMR.

4. On March 1, 1999, prior to the three-year deadline, PageNet filed a request for waiver of or, in the alternative, forbearance from the construction requirements of Section 90.665(b) and (c). Specifically, PageNet requests waiver of its three-year and five-year construction deadlines to allow PageNet until the end of its ten-year license period to demonstrate either coverage of two-thirds of the population of its MTA or that it is providing substantial service. In the alternative, PageNet requests that the Commission forbear, pursuant to Section 10 of the Communications Act, from applying Section 90.665(b) and (c) to PageNet.

5. Two parties, Preferred Communications, Inc. ("Preferred"), an 800 MHz licensee, and Industrial Communications & Electronics, Inc. ("ICE"), a 900 MHz licensee, commented on PageNet's waiver request.<sup>5</sup> Preferred did not oppose the waiver, but argued that any waiver should be conditioned on PageNet using its 900 MHz SMR spectrum to offer new information or messaging services.<sup>6</sup> ICE opposed the waiver request, arguing that PageNet has not met the standard necessary to justify waiver and that grant of the waiver would be inconsistent with the underlying policies of Section 90.665.<sup>7</sup>

### III. DISCUSSION

#### A. Waiver Request

6. Pursuant to Section 1.925 of our rules,<sup>8</sup> a party requesting a waiver of a Commission rule must affirmatively show that (1) the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (2) the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest, or there are no reasonable

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at the five-year mark. The Wireless Telecommunications Bureau has waived the requirement that licensees that elect substantial service indicate, at the three-year mark, how they intend to demonstrate substantial service at the five-year mark. *See Construction Requirements for Metropolitan Area-Based Licenses in the 896-901/935-940 MHz Band*, DA 99-1564 (rel. Aug. 6, 1999).

<sup>4</sup> *See* FCC Announces Grant of 900 MHz Specialized Mobile Radio MTA Licenses, *Public Notice*, 12 FCC Rcd. 13,055 (1996).

<sup>5</sup> Preferred Communication Systems, Inc. Comments on PageNet Request for Waiver (May 7, 1999) ("Preferred Comments"); Industrial Communications & Electronics, Inc. Opposition to Request for Waiver (May 7, 1999) ("ICE Comments").

<sup>6</sup> Preferred Comments at 1.

<sup>7</sup> ICE Comments at 1.

<sup>8</sup> 47 C.F.R. § 1.925.

alternatives.<sup>9</sup> As discussed in detail below, we find that PageNet has failed to satisfy our waiver requirements.<sup>10</sup>

7. In adopting the coverage requirements for 900 MHz SMR licensees, we concluded that they were reasonable and attainable and would promote efficient use of the spectrum. Further, we found that the construction requirements would serve as a deterrent to competitors seeking to warehouse spectrum. We also concluded that the “substantial service” option would give licensees flexibility in this band, particularly in instances in which licensees offer cutting-edge niche services.<sup>11</sup>

8. PageNet contends that it is entitled to a waiver because of the nationwide scope of its proposed operations, their cost, and the innovative messaging technologies it intends to offer.<sup>12</sup> PageNet also argues that grant of a waiver would not frustrate the underlying purpose of the construction requirement because it fully intends to utilize the spectrum, not to warehouse it to prevent competitors from using it. Further, PageNet avers that strict adherence to the Section 90.665 coverage requirements would disserve the public interest by stifling the introduction of new and diverse products and services into the marketplace, to the ultimate detriment of consumers.<sup>13</sup>

9. We find that PageNet has failed to show that it lacks a feasible alternative within Section 90.665 to satisfy the five-year construction requirement. As PageNet acknowledges, even if it does not meet the population coverage benchmarks of Section 90.665(c), it has the option of meeting the construction obligation through a showing of substantial service.<sup>14</sup> Moreover, PageNet has well over a year—until August 12, 2001—to make this showing. Thus, our substantial service option allows PageNet precisely what it seeks—the time and flexibility to introduce innovative or specialized services into the marketplace. PageNet has provided no evidence that it cannot begin utilizing its spectrum to deploy new technologies and services in the 900 MHz band by the August 12, 2001 deadline. We adopted this liberal construction standard for the 900 MHz band, in part, because we recognized the difficulty in establishing strict construction benchmarks for new services.<sup>15</sup> Further, the recently approved merger of Arch Communications and PageNet should enhance PageNet’s ability to satisfy the construction requirements by the five-year deadline.<sup>16</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> PageNet requested waiver of Section 90.665(b) and (c) under former Section 90.151, which required petitioners to show that unique circumstances were involved and that there was no reasonable alternative solution within existing rules. 47 C.F.R. § 90.151 (1997). However, at the time of PageNet’s filing, Section 90.151 and other waiver provisions applicable to wireless services had been consolidated into Section 1.925. 47 C.F.R. § 1.925.

<sup>11</sup> *Second Report and Order*, 10 FCC Rcd at 6898.

<sup>12</sup> PageNet Request at 10-12.

<sup>13</sup> *Id.* at 12.

<sup>14</sup> PageNet Request at 13.

<sup>15</sup> *Second Report and Order*, 10 FCC Rcd at 6898.

<sup>16</sup> In the Matter of Arch Communications Group, Inc. and Paging Network, Inc. For Consent to Transfer Control of Paging, Narrowband PCS, and Other Licenses, DA 99-3028 (WTB, Apr. 25, 2000).

10. In addition, we find that PageNet has failed to show that the underlying purpose of the rule would not be served by application of the rule. One of the primary purposes of these construction requirements is to ensure that licensees deploy services by the mid-points of their license terms, thereby providing consumers timely access to services. While we applaud PageNet's desire to introduce innovative services into the marketplace, this is not a sufficient justification for a five-year extension of our construction requirements. Further, the record is devoid of any evidence demonstrating that PageNet has taken measures since the grant of its licenses to utilize the 900 MHz SMR spectrum. We therefore agree with ICE that PageNet has failed to describe any circumstances unique to its operation that would justify a waiver.<sup>17</sup>

11. PageNet also argues that the 900 MHz SMR band is analogous to the Wireless Communications Service ("WCS") and Interactive Video Data Service ("IVDS"), which have construction requirements consistent with the relaxed construction deadlines PageNet seeks.<sup>18</sup> We disagree. We adopted the more liberal construction requirement for WCS, *i.e.*, substantial service within 10 years, largely because of the underdeveloped nature of equipment for use in the WCS band and the strict technical requirements we adopted to prevent interference.<sup>19</sup> We agree with ICE that these circumstances do not exist in the 900 MHz band,<sup>20</sup> and we thus reject PageNet's assertions.<sup>21</sup> As for IVDS, we adopted a single benchmark requirement of substantial service at the ten-year mark in large part because the five-year benchmark had already passed and the three- and five-year benchmarks had been suspended.<sup>22</sup> As discussed above, however, the five-year construction requirement applicable to 900 MHz SMR licensees remains attainable for PageNet.<sup>23</sup>

12. For these reasons, we conclude that PageNet has failed to show that compliance with the five-year substantial service requirement is impracticable or that waiver would otherwise be in the public interest. To the extent PageNet is concerned about satisfying the substantial service requirement, it has the option of filing a proposed substantial service showing prior to its five-year deadline, and seeking a declaratory ruling whether such showing meets the requirement. Our decision is also without prejudice to PageNet's right to seek a waiver at a later time, provided that it can demonstrate that compliance with the rule is not feasible and that grant of a waiver would otherwise be in the public interest.

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<sup>17</sup> ICE Comments at 5.

<sup>18</sup> PageNet Request at 14.

<sup>19</sup> In the Matter of Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, 12 FCC Rcd 10785, 10843 (1997).

<sup>20</sup> ICE Comments at 8.

<sup>21</sup> In the 900 MHz SMR band, technology and equipment are available to licensees and several incumbents are providing service.

<sup>22</sup> In the Matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, 15 FCC Rcd 1497, ¶ 75 (1999).

<sup>23</sup> Because we are denying PageNet's waiver request, there is no need for us to address Preferred's proposal that we condition PageNet's request.

## B. Forbearance Request

13. As an alternative to its waiver request, PageNet requests that the Commission forbear, under Section 10 of the Communications Act of 1934, as amended, from applying the Section 90.665 coverage requirements to PageNet.<sup>24</sup> Section 10(a) of the 1996 Act provides for regulatory flexibility by requiring the Commission to forbear from applying “any regulation or any provision of this Act to a telecommunications carrier or telecommunications service . . . if the Commission determines that-

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.”<sup>25</sup>

14. In making this public interest determination, Section 10(b) requires the Commission to consider whether forbearing from enforcing the regulation “will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”<sup>26</sup> Further, “if the Commission determines that such forbearance will enhance competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”<sup>27</sup>

15. For the reasons discussed below, we conclude that forbearance from applying the 900 MHz construction requirements to PageNet is not warranted under the third prong of Section 10(a),<sup>28</sup> which requires us to find that carrier-specific forbearance for PageNet is consistent with the public interest.<sup>29</sup>

16. In adopting the 900 MHz SMR coverage requirements, we concluded that Section 90.665 “is reasonable and attainable for 900 MHz MTA licensees while also serving as a suitable deterrent to competitors who may seek to obtain MTA licenses for anti-competitive warehousing rather than for

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<sup>24</sup> By previous order, the Wireless Telecommunications Bureau extended by 90 days the deadline for considering PageNet’s forbearance request, as provided under Section 10(c) of the Act. *See* Paging Network, Inc., *Order*, DA 00-223 (WTB, rel. Feb. 8, 2000) (extended until May 30, 2000 the one-year period for review of PageNet’s forbearance request).

<sup>25</sup> 47 U.S.C. § 160(a).

<sup>26</sup> *Id.* § 160(b)

<sup>27</sup> *Id.*

<sup>28</sup> Because we conclude that forbearance from Section 90.665 with respect to PageNet is inconsistent with the public interest, we find it unnecessary to address the first and second prongs of the Section 10(a) analysis.

<sup>29</sup> *Id.* § 160(a)(3).

service to the public.”<sup>30</sup> PageNet has offered no evidence, and we have no basis for concluding, that forbearance from Section 90.665 would enhance competition among telecommunications providers.<sup>31</sup> Moreover, there is nothing in the record to suggest that forbearance is warranted for PageNet but not other 900 MHz SMR licensees. While Section 10 permits us to forbear from applying our regulations to a single telecommunications carrier, the statute provides that we may do so only where the record shows that such forbearance is consistent with the public interest. We find that enforcement of the 900 MHz construction requirements in PageNet’s case will continue to serve the public interest by facilitating the provision of service to smaller markets, hastening the deployment of innovative services in the marketplace, and promoting efficient use of the spectrum. Accordingly, we conclude that forbearance from applying Section 90.665 to PageNet is not consistent with the public interest.

#### IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), that the request for waiver of Section 90.665(b) and (c) filed by Paging Network, Inc. is DENIED.

18. IT IS FURTHER ORDERED, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. §160, that the request for forbearance from enforcement of Section 90.665(b) and (c) filed by Paging Network, Inc. is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>30</sup> *Second Report and Order*, 10 FCC Rcd at 6898.

<sup>31</sup> *See* 47 U.S.C. § 160(b).